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In the Supreme Court of the United States

OCTOBER TERM, 1961

ARTHUR ATHENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 307-325; Pet. App. 1-19) is reported at 297 F. 2d 639.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1961 (R. 307, 326; Pet. App. 20). A petition for rehearing was denied on January 22, 1962 (R. 343; Pet. App. 21). The petition for a writ

of certiorari was filed on February 19, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the conviction.

2. Whether certain testimony was properly received on rebuttal.

STATUTE INVOLVED

Section 176a of Title 21 U.S.C. provides in pertinent part:

> Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *
>
> * * * *

STATEMENT

A two count indictment returned in the District Court for the Southern District of Texas charged the petitioner and one Alberta Curtis with having smug-

gled marihuana into the United States and with having conspired to do so, in violation of 21 U.S.C. 176a, *supra* (R. 4-6). Following a trial by jury, the petitioner and Mrs. Curtis were found guilty as charged. On February 24, 1961, the petitioner was sentenced to ten years' imprisonment "on Counts 1 and 2 jointly" (R. 302-303). On appeal, the conviction of each defendant was affirmed (R. 307-325, 326; Pet. App. 1-19, 20). Mrs. Curtis has not joined the petition for a writ of certiorari.

The pertinent facts may be summarized as follows:

1. In late October 1960, the husband of co-defendant Alberta Curtis made arrangements in New York with an airline company for the petitioner and Mrs. Curtis to travel to San. Antonio, Texas, under the names of "A. Dale" and "Barbara Curtis" (R. 67, 167-168, 184-185). In San Antonio, on October 28, 1960, Mrs. Curtis sought to rent an automobile, saying that she planned on traveling to Mexico where she would visit friends and do a "little business" (R. 14, 15). When the employee in charge said that a deposit of $250.00 was required on an automobile, Mrs. Curtis, who had about $200.00 on her person, left and returned with petitioner (R. 16-17). When apprised that a $250.00 deposit was required, the petitioner said to Mrs. Curtis, "Why did you say [to the employee] Mexico City? You only have to go to Monterrey" (R. 17). Petitioner then put up the balance of the deposit, and he and Mrs. Curtis obtained a rented automobile and drove off (R. 17, 21, 26-27).

That evening, the petitioner and Mrs. Curtis registered as "Mr. and Mrs. Artie Curtis" at the Plaza

Hotel in Laredo, Texas (R. 30, 31, 95-96, 288). On the following day, Mrs. Curtis drove alone to Monterrey, Mexico, where she registered at a hotel under the name of "Helen Ward" of 240 E. 35th Street, New York, New York (R. 97-99, 293, 294).[1] She placed three long distance telephone calls to the petitioner in Laredo on that day (October 29), and telephoned him again on the following day (R. 99, 100, 109, 291-293).

At about 1:00 a.m. on November 1, 1960, Mrs. Curtis drove up to the United States Customs Office at the International Bridge, Laredo, Texas (R. 36-37). She told a customs officer that she had a "very embarrassing accident," indicating that she had relieved herself in the automobile (R. 39, 44, 47). She appeared to be "in a hurry" (R. 47). Customs agents subsequently found in the door panels and under and behind the rear seat of the automobile about 100 pounds of marihuana which was contained in 181 packages (R. 41-42, 44-45, 51-53). Mrs. Curtis said that she knew nothing about the packages. She said that she and her husband had traveled from New York to San Antonio, where they rented the automobile; that her husband remained in Laredo on business matters while she traveled to Monterrey to visit some friends; and that her husband had returned to New York (R. 58). She

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[1] Mrs. Curtis testified that she lived "with some people" for a "very short period of time" at the 35th Street address (R. 156-157). She said that she was not living at that address when she registered at the hotel in Monterrey, and that "Helen Ward" could not have been located at the 35th Street address (R. 157-158).

"declined to identify" the people whom she had visited in Monterrey (R. 58).

Later that day, customs agents arrested the petitioner in Laredo. After being advised that he need not make a statement and that any statement he might make could be used against him, the petitioner said that he had flown from New York to Laredo by himself, and that he was visiting friends—the "Wilsons"—who were at a certain hotel in Laredo (R. 64). When the agents said that they knew that the petitioner had registered at the Plaza Hotel as "Artie Curtis" and that Mrs. Curtis had been found at the International Bridge in possession of marihuana, the petitioner admitted that he and Mrs. Curtis had registered at the Plaza Hotel as "Mr. and Mrs. Curtis." He said that he did not know anything about any marihuana (R. 64-65).

Subsequently, the petitioner was taken to the International Bridge where Mrs. Curtis was being held. Mrs. Curtis said that the petitioner was not her husband, but that he had traveled with her from New York to Texas (R. 65). The petitioner then said that Mr. Curtis had asked him to accompany Mrs. Curtis to Monterrey but that petitioner had agreed to accompany her only to Laredo (R. 65-66, 68-69, 197, 200-203). When the petitioner was asked why he told Mr. Curtis that he would not go into Mexico, he declined to state the reason (R. 197). When apprised that Mrs. Curtis had only $44.00 on her person, the petitioner said that he had planned on purchasing her return travel ticket to New York. A few days later, the petitioner admitted that he had

traveled from New York under the name "A. Dale," who he said was a friend of his in New York (R. 66, 67).[2]

2. The petitioner did not take the witness stand at the trial. Mrs. Curtis testified that in September or October 1960, she met a former girl friend, and that they made plans to meet in Monterrey (R. 88-90, 91, 132-133, 136). Since her husband was unable for reasons of business to make the trip, he persuaded the petitioner, who was a close friend of the family, to accompany her southward (R. 91-92). She said that the petitioner became ill in Texas, and they had registered at the hotel in Laredo as "Mr. and Mrs. Artie Curtis" so that she could take care of him. On the following day, she drove to Monterrey where she subsequently met "Mr. and Mrs. Wilson" (R. 95-97, 101-102). She allowed "Mr. Wilson" to use the car and he parked it for her at night (R. 103-105). She telephoned the petitioner in Laredo in order to inform him of her safe arrival in Monterrey and to check on his illness (R. 99-101).[3] She did not stop the car while driving back to Texas at night because she was frightened. She admitted that she had lied to a customs agent at the time of her arrest regarding the whereabouts of her husband (R. 143-144).

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[2] Mr. Curtis testified that he did not know an "Art Dale" but picked the name from "out of the air" (R. 167-168).

[3] The desk clerk at the Plaza Hotel testified that the petitioner looked normal at the time he and Mrs. Curtis registered (R. 35). At the time of his arrest, the petitioner was in a restaurant drinking coffee.

Mr. Curtis testified that he persuaded the petitioner to take the trip southward with his wife. He arranged air passage for the two under the names "A. Dale" and "Barbara Curtis" to prevent anyone from assuming an improper relationship. He said that he and the petitioner were very close personal friends, and that the petitioner never gave him any indication that he had ever been in Texas before (R. 184). Both Mr. and Mrs. Curtis testified that they had no knowledge or indication that the petitioner had ever had dealings in marihuana (R. 155-156, 185).

3. In rebuttal, the government offered the testimony of a Mrs. Collins, an employee of an automobile rental firm, that on August 5, 1960, the petitioner rented an automobile in San Antonio, Texas, in order to vacation in Mexico and that, when he returned it on August 9 at Houston, it had been driven over 1,000 miles (R. 204-211). No objection was made to this testimony.

Detective Ahern of the narcotics bureau of the New York Police Department testified that, on November 30, 1960, he had a conversation with the petitioner in New York City (R. 213-214). The following colloquy took place (R. 214):

> Q. And was anything said in that conversation concerning Athens' use of marijuana?
>
> A. There was.

Counsel for the petitioner objected on the grounds, *inter alia*, that the testimony was not proper rebuttal. After the jury was excused, the Assistant United

States Attorney pointed out to the court (R. 215-216):

> As I understand, the witness will testify that, in this conversation, Athens told him that he had been smoking marijuana for three or four months, which would have covered the period of time involved in this conspiracy count and the subs[tantive] count here. Clearly, the matter would have been admissible in the case in chief, but I think it is also proper rebuttal testimony in view of the statements from the witness stand of the defendant Curtis and of her husband, that they were closely connected with the defendant Athens, so closely that they saw him every day, and he was closer than a brother; that they knew nothing about his use of marijuana, and that the only purpose for this trip of coming to Texas was for Athens to accompany Curtis on the trip. This shows that there is another motive, and therefore rebuts their statements.

The court sustained the objection to Detective Ahern's testimony on the ground that it was improper rebuttal testimony (R. 217-218). Counsel for the petitioner then moved for a mistrial, which was denied (R. 218). Counsel did not request the court to strike any of Detective Ahern's testimony.

ARGUMENT

1. There is no merit to the petitioner's contention (Pet. 15-18) that the evidence is insufficient to support the conviction. Since the petitioner received a concurrent term of imprisonment on each of the counts, which was below the maximum that he could

have received on either of the counts (see 21 U.S.C. 176a, *supra*), the conviction may be sustained on a showing that the evidence is sufficient to support conviction on either count. *Claassen* v. *United States*, 142 U.S. 140, 147; *Rovlaro* v. *United States*, 353 U.S. 53.

Taking the conspiracy count, the evidence amply warranted the jury in finding that the petitioner and Mrs. Curtis conspired to smuggle a large quantity of marihuana into the United States. Although Mrs. Curtis was alone in possession of the marihuana on November 1, 1960, the evidence justified the conclusion that petitioner was an interested and active participant in the smuggling venture. The petitioner not only accompanied Mrs. Curtis from New York to Texas and assisted her in obtaining a rented automobile for the trip into Mexico, but was in close contact with her activities in Monterrey through four long distance telephone calls she made to him while in Mexico. He remained in Laredo to await her return from Monterrey, and planned on purchasing her return travel tickets to New York. This evidence, together with the fact that petitioner attempted to conceal his identity through the use of fictitious names from the time he left New York to the time of his arrest, and the fact that the petitioner and Mrs. Curtis lied and gave contradictory stories to customs agents at the time of their respective arrests, amply warranted the jury in concluding that the petitioner was a participant in the smuggling attempt.

Nor is there any validity to petitioner's contention that evidence elicited from his co-defendant, Mrs.

Curtis, or introduced in rebuttal to her testimony, cannot be considered in relation to his conviction (*e.g.*, Pet. 17). Petitioner did not request a separate trial, and his and Mrs. Curtis's defense was conducted jointly by the same counsel. In calling Mr. and Mrs. Curtis (and another witness), the defense did not indicate that these witnesses were appearing only on behalf of Mrs. Curtis; moreover, much of their direct testimony[1] could have had little other purpose than to exculpate petitioner. Petitioner had the advantage of the testimony of these witnesses to support his alibi at the trial; the fact that the jury rejected his alibi does not mean that he can now disown that testimony or avoid the consequences of its having been introduced by the defense.

2. There is no merit in the contention (Pet. 18-24) that the trial court improperly received rebuttal testimony.

a. *The testimony of Mrs. Collins.*: As shown by the Statement, *supra*, Mr. and Mrs. Curtis testified that the petitioner was a close friend of the family, but that they did not know of any prior trip which the petitioner might have taken to Texas or Mexico. In rebuttal, Mrs. Collins testified that, in early August 1960, the petitioner rented an automobile in San Antonio, Texas, for the purpose of vacationing in Mexico, and that the car, which indicated that it had been driven over 1,000 miles, was returned a few days later.

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[1] Including that in connection with which the rebuttal evidence, discussed *infra*, was introduced (R. 91-92, 167).

Petitioner contends that this testimony did not constitute proper rebuttal. Preliminarily, the petitioner has no standing to raise this issue, for he failed to object to this testimony at the trial or to request that it be stricken from the record. Petitioner did not even raise this issue in the court below. In any event, the testimony was properly received in rebuttal. If the Curtises did not know of so recent a trip by petitioner, it tended to disprove their testimony of so close a relationship with petitioner that he would accompany Mrs. Curtis on a vacation trip. If they did know of it, it refuted their testimony that they did not know petitioner had been in Mexico before.

b. *The swearing and questioning of Detective Ahern.* As shown by the statement, *supra*, Detective Ahern was called as a government rebuttal witness, and, after having testified that, in November 1960, he had had a conversation with the petitioner regarding marihuana, the court sustained a defense objection that the testimony was improper on rebuttal. The petitioner did not request that any part of Ahern's testimony be stricken from the record. Instead, he moved for a mistrial, which was denied.

As noted by the court of appeals (Pet. App. 16), the district court in the exercise of its discretion could properly have admitted this testimony. See *Goldsby* v. *United States*, 160 U.S. 70, 74. More-

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In the *Goldsby* case, this Court pointed out that, even assuming the rebuttal testimony "should have been more properly introduced in the opening [*i.e.*, the case-in-chief], it was purely within the sound judicial discretion of the trial court to allow it, which discretion, in the absence of gross abuse, is not reviewable here."

over, Ahern's proposed testimony was properly offered in rebuttal since it negated the testimony of the Curtises that, although they were close personal friends of the petitioner, they knew nothing about any connection which he might have had with marihuana. Petitioner thus received a more favorable ruling than was his due.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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